No. 43108-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

---

STATE OF WASHINGTON,
Respondent,

v.

BRYAN L. HART,
Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

---

THE HONORABLE GORDON GODFREY, JUDGE

---

# BRIEF OF RESPONDENT

---

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: _____
KRAIG C. NEWMAN
Sr. Deputy Prosecuting Attorney
WSBA #33270

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

---

# TABLE

## Table of Contents



## TABLE OF AUTHORITIES

### Table of Cases

## STATUTES

**Table of Court Rules**



## OTHER

## STATEMENT OF CASE

On October 5, 2011, Officer Cody Blodgett of the Hoquiam Police Department took a statement from Jennifer Hargrove. (RP 01/11/12 at 47). She reported that she had received several text messages from ex-boyfriend that were of a threatening nature. (RP at 48). He observed the messages. *Id.* He also took a statement from Hargrove where she expressed concern for her safety. (RP at 49).

The messages stated: "you should leave town today, right fuck now before I find you," "you will learn respect if you learn nothing else," "no, you or him don't understand respect. I'm fine being in prison. It's my destiny," "If my dick is fucked up, you're - you're next, stripper whore," and "Don't worry, slut. I'm going to fuck you up and him." (RP 01/11/12 at 38 - 41).

Based on this report, the officer attempted to contact the appellant. *Id* Due to a previous incident involving the defendant and a firearm the Hoquiam Police Department responded with five officers. *Id.* Officer Blodgett went to the door with Officer David Peterson. The appellant answered and appeared to have just woken. (RP at 53). The officer asked the appellant to step outside in order to have a conversation. (RP at 54). The appellant then closed the door. (RP at 53). The officer then moved back from the residence in order to establish containment of the area. (RP at 54).

Approximately five minutes later the front door opened and the appellant walked out. He appeared to have a small black pistol in his hands. (RP at 56). The appellant appeared to be scanning the area with the weapon. *Id.* The appellant aimed his weapon at the officer. (RP at 57). The officer was concerned that he maybe shot. (RP at 58). This situation lasted for two or three seconds, and then the officer raised his rifle at the appellant. *Id.* The appellant then retreated into his residence. Officer Daniel McCartney of the Hoquiam Police Department also witnessed these events and saw the appellant point his weapon at Officer Blodgett. (RP at 28).

After that the officers maintained containment of the appellant's residence for the duration of the stand-off. *Id.* The incident lasted from approximately 3am to 9 am. (RP at 25).

After the stand-off, a 9mm pistol was recovered from the appellant's residence.

The defendant was convicted of Assault in the Second Degree with a firearms enhancement and Misdemeanor Harassment.

## ARGUMENT

### 1. The Defendant's Public Trial Right was not Violated.

This Court reviews a possible violation of the public trial right de novo. *State v. Bennett,* 168 Wn.App. 197, 201, 275 P.3d 1224, 1226 (2012). The public trial right belongs to the appellant and to the public. *Id.* at 203. It is the burden of the appellant to prove a violation of this right. *Id.*

at 207. Generally all proceeding during a criminal trial must be done in open court and in the presence of the defendant. *Id.* at 203. Discussion by the parties and the court regarding purely administrative or ministerial functions, done in camera, do not violate the requirement of a public trial *Id.* at 207.

In *State v. Bennett*, the appellant claimed a violation of his public trial right. The record only indicated that some discussion regarding jury instruction occurred in chambers, outside the presence of the public. *Id.* The record was devoid of the substance of the discussion. *Id.* The Court held that the record was not sufficient to decide the issue.

The facts of *State v. Bennett,* are identical to the facts presented in this case. The record in this case indicates that the trial judge invited counsel for each party to a formal discussion regarding the jury instructions "in my chambers." (RP 01/11/12 at 70). The judge stated that the discussion would pertain to the format that would be used. *Id.* Nothing else in the record clarifies what was said at this meeting.

A conversation regarding the format of the jury instructs is purely administrative and is not a violation of the public trial requirement, and there is no evidence of any other discussions.

For this reason the Court should deny the appellant's claim of error.

**2. The Appellant's Fifth Amendment Right Was Not Violated.**

When an accused voluntarily takes the stand he waives his constitutional rights as to all matters concerning which cross-examination

is otherwise normally proper. *State v. Robideau*, 70 Wash.2d 994, 1001, 425 P.2d 880, 884 (1967). The scope of cross-examination is a matter of discretion of the court. *State v. Epefanio,* 156 Wash.App. 378, 234 P.3d 253 (2010). Review of the trial court decision is subject to harmless error analysis. *Id.* at 390.

The trial judge did not abuse his discretion when he allowed the cross-examination of the appellant regarding the text message he had previously sent to the victim on the Harassment charge. The fact that the appellant had recently sent these messages was relevant to statements made by the appellant regarding his knowledge of the purpose of the police.

The appellant testified that he was "scared" and did not "know what was going on." The surprise was a crucial aspect of his defense. The appellant claim is that he hiding in his residence from unknown intruders. Evidence that he recently sent text messages to the victim in this case that stated "you should leave town today, right fuck now before I find you," and "you think I'm joking" is relevant to the fact that he was fully aware who was knocking on his door and why they were there.

Moreover, if this was error then it was harmless error. Constitutional errors may be so insignificant as to be harmless. *State v. Guloy,* 104 Wash.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Constitutional error is harmless if the appellate court "is convinced beyond a reasonable doubt

that any reasonable jury would have reached the same result in the absence of the error." Guloy, 104 Wash.2d at 425, 705 P.2d 1182. *Id.*

In this case the Respondent presented the testimony of Jennifer Hargrove that the appellant sent her a number text messages. (Report of Proceedings 01/11/12 at 38 - 41) . The messages stated: "you should leave town today, right fuck now before I find you," "you will learn respect if you learn nothing else," "no, you or him don't understand respect. I'm fine being in prison. It's my destiny," "If my dick is fucked up, you"re - you're next, stripper whore," and Don't worry, slut. I'm going to fuck you up and him." *Id.*

On cross-examination the defendant generally denied recollection of sending the messages and stated that the victim knew he was not serious about his statements. Given the self serving nature of the appellant's responses to cross-examination one can only conclude that it did not have a influence outcome the trial.

### 3. The State Presented Ample Evidence To Prove The Crimes Charged.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum,* 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy,* 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the

sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington,* 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Carmillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State is not required to prove the firearm was operable. *State v. Padilla*, 95 Wn.App. 531, 978 P.2d 1113 (1999). The firearm in *State v. Padilla* was, in fact, inoperable prior to the alleged possession by the defendant. *Id.* at 533. Padilla's firearm was found by police to be in three pieces, and Padilla testified that it was disassembled while in his possession. *Id.*

The Court of Appeals ruled that a disassembled firearm that could be made operable in a reasonable amount of time was a firearm for the purposes of criminal prosecution, and upheld Padilla's conviction.

In *State v. Faust*, 93 Wn.App. 373, 967 P.2d 1284 (1998), the Court of Appeals ruled that a firearm rendered inoperable due to mechanical defect was a firearm for the purposes of sentencing enhancement. Eric Wayne Faust assaulted his wife over a several hour period during which time, he held the knife to her throat and pointed a semi-automatic pistol at her. The defendant's wife testified that the gun

was not working at the time. Police tested the gun and could not get it to fire. The slide mechanism of the gun was damaged to the point where it would not load a round into the chamber. *Id.* at 375.

The appeals court ruled that the definition of a firearm was written to distinguish between a "toy gun" and a gun "in fact." *Id.*, at 380.

**4. Failure to give a definition instruction is not a constitutional error that can be raised for the first time on appeal.**

As a general rule a appellant may not raise an issue for the first time during an appeal. RAP 2.5(a). In order to preserve an issue, regarding evidence admitted at trial, for appeal the appellant must make a timely motion to suppress. State v. Slighte, 157 Wash.App. 618, 623, 238 P.3d 83, 85 (2010). A criminal defendant may raise an issue for the first time during appeal if that issue is manifest error affecting a constitutional right. *Id.* The Washington State Supreme Court has stated that the exception to the general rule that issues cannot be raised for the first time on appeal "is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251, 1256 (1995). The issue must be "truly of a constitutional magnitude." *Id.* Moreover, if the facts "necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *Id.*

The failure to define a term, with common meaning, in the jury instructions is not an error of constitutional magnitude. *State v. Roberts*, 142 Wash.2d 471, 501, 14 P.3d 713, 730 (2000); *State v. Scott,* 110 Wash.2d 682, 757 P.2d 492 (1988). In *State v. Scott,* the trial court failed to give an instruction defining knowledge. *Id.* at 683. The appellant claimed that this was constitutional error. The Supreme Court explained in its holding that failure to give a definition instruction is not failure to instruct as to every element of the crime. *Id.* at 690. It went on to explained that because knowledge's statutory definition was not substantially different then its common meaning it was not constitutional error to fail to give the instruction. *Id.* at 691.

The terms "armed" and "firearm" have common meaning, and given the facts of this cased the common meaning of these words do not substantially differ from the appellant proposed legal definitions. This is clear from WPIC 2.10.01, which defines both the terms at issue. The "note on use" section of the annotation to this instruction explains that the definition of armed should not be given if, as in this case, the "weapon was actually used and displayed during the commission of the crime." The jury should rely on it common understanding of the term. The instruction defines "firearm" as a weapon or device from which a projectile may be fired by an explosive such as gunpowder." This is the common definition of firearm.

For this reason the failure to define these instruction is not of constitutional magnitude.

**5. The jury was properly instructed as to the "true threat" requirement.**

In *State v. Schaler*, 169 Wash.2d 274, 236 P.3d 858 (2010), the Supreme Court of Washington held that in addition to the statutory element of the crime of Harassment the jury must be given a "true threat" instruction that explained the appellant knew or could reasonably foresee that the person threatened would be put in reasonable fear that the threat would be carried out. *Id.* at 286. This instruction was included in the instructions given to the jury.

The jury was instructed that in order to convict the appellant of the crime of harassment that they must find beyond a reasonable doubt that he "knew that his words or conduct would place Jennifer Hargrove in reasonable fear that the threat to kill would be carried out." This is the definition of "true threat" as defined in *State v. Johnston*, 156 Wash 2d. 355, 127 P.3d 707 (2006), that was cited by the appellant.

The appellant complains that the words "true threat" do not appear in the instruction and the definition was not in the jury instructions. But, this is a matter of form not substance. The "true threat" definition was presented as an element, which put to jury to a specific finding, beyond a reasonable doubt, that the appellant know his action would cause reasonable apprehension. Therefore the requirement of *State v. Schaler* has been met.

### 6. The words "true threat" are not required in the charging language.

The appellant argues that the some reference to the concept of "true threat" must be in the charging language of the information. This issue has been decided by the Court of Appeals in *State v. Tellez,* 141 Wash.App 479, 170 P.3d 75 (2007). The Court of Appeals held that: "constitutional concept of true threat merely defines and limits the scope of the essential threat element in the felony telephone harassment statute and is not itself an essential element of the crime." The "true threat" Language does not have to be in the information or the "to convict" instruction. The jury must be informed of this concept in the final instructions.

### 7. The appellant counsel was not ineffective.

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that "[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." *State v. Thomas,* 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney's performance fell below an acceptable standard, but also that his attorney's failure affected the outcome of the trial.

*Strickland v. Washington* explains that the defendant must first show that his counsel's performance was deficient. 466 U.S. 668, 687, 80

L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

The appellant first claims ineffective counsel for failure to investigate. It is the appellant burden to establish this claim, but there is little evidence in the record for the Court to decide such an issue. All the appellant cites is a statement by counsel that there may have been mental health issues. But, in the same statement counsel explained that he had talked to the appellant about the matter, and his mother about the subject. His conclusion the mental health issued did not amount to a defense. He is

an experienced trial attorney, who understands the burden of proving such a defense.

The record in this case is not complete enough to find that counsel's performance fell below an acceptable standard.

Appellant also claims ineffective counsel for his failure to object to a single answer to a question. Officer Bloggett was asked if the victim in this case expressed concern for her safety, when she reported the threatening text messages. The officer responded "[y]es. While speaking with her she did." (RP at 49). This falls in the hearsay exception pursuant to ER 803(a)(3). This rule provides and exception for the statement of the declarant's then existing state of mind. *State v. Parr,* 93 Wash.2d95, 606 P.2d 263 (1980), held that a witness can testify that the victim feared the defendant.

For this reason, counsel's failure to object to this statement is professionally justified.

**CONCLUSION**

For the reasons stated above the respondent request that this Court deny all of the appellant's claims of error.

DATED this 26 day of November, 2012.

Respectfully Submitted,

By: _____

KRAIG C. NEWMAN
Sr. Deputy Prosecuting Attorney
WSBA #33270

KCN/

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>BRYAN L. HART,<br>Appellant. | No.: 43108-4-II<br>**DECLARATION OF MAILING** |

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 26th day of November, 2012, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry, Backlund & Mistry, P. O. Box 6490, Olympia, WA 98507, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 26th day of November, 2012, at Montesano, Washington.

Barbara Chapman



H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 FAX 249-6064